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No. 79-1230

In the Supreme Court of the United States

OCTOBER TERM, 1979

GILLIAM RAYMOND COATS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 611 F.2d 37.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1979. A petition for rehearing was denied on January 10, 1980 (Pet. App. 7a). The petition for a writ of certiorari was filed on February

8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the boarding of an American vessel on the high seas by Coast Guard officers to conduct a safety and documentation check violated petitioner's rights under the Fourth Amendment.

2. Whether the jury selection plan of the United States District Court for the Eastern District of North Carolina deprived petitioner of a jury drawn from a fair cross section of the community, in violation of the Jury Selection and Service Act of 1968 or the Constitution.

3. Whether the in-court identification of petitioner by a government witness was the product of an impermissibly suggestive pretrial confrontation.

4. Whether a motel registration card was improperly admitted into evidence at trial.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted of conspiring to import marijuana, in violation of 21 U.S.C. 963. He was sentenced to five years' imprisonment, to be followed by a five-year special parole term,[1] and fined $15,000. The court of appeals affirmed (Pet. App. 1a-6a).

[1] Petitioner does not contest the propriety of imposing a special parole term as part of his sentence for the narcotics conspiracy. That issue is presently before the Court in *Bifulco* v. *United States*, No. 79-5010, argued Feb. 27, 1980. However, there is no need for the Court to defer consideration of this petition until *Bifulco* is decided. If the Court in *Bifulco* concludes that a special parole term may not be imposed in a case such as this, petitioner may move the district court for correction of his sentence under Rule 35, Fed. R. Crim. P.

The evidence showed that in July 1977, petitioner, acting on behalf of David Govus, alias "Sam" (A. 662, 894-895),[2] hired Paul Breslin to pilot a boat to Colombia to pick up a cargo of marijuana (A. 602-605, 889-893). On January 2, 1978, petitioner telephoned Breslin and instructed him to be in Mobile, Alabama, on January 4. Breslin and his two-man crew arrived in Mobile as instructed. Petitioner, using the name "Jack Long" (A. 644), advised them that he had found a boat (A. 898-899).

On the following day, petitioner accompanied Breslin and his crew to Bayou LaBatre, Alabama, where they inspected the shrimp trawler LADY ELLEN (A. 902-903). During the next several days, Breslin and his crew made repairs to the vessel and obtained provisions for the trip with money provided by petitioner (A. 905-907).

On January 8, 1978, Govus arrived in Mobile with a conveyor belt that was loaded onto the LADY ELLEN (A. 908-909). The following day, Govus met with petitioner and Breslin and gave detailed instructions for the voyage to Colombia (A. 911-913). Subsequently, Govus placed two large suitcases containing one-hundred dollar bills aboard the LADY ELLEN

[2] "A." refers to the joint appendix in the court of appeals.

(A. 913). The vessel departed on January 10—with only Breslin and his two-man crew on board—and arrived eight days later off the coast of Colombia. Govus met the boat in a cove, where it was loaded with bales of marijuana. The vessel then began its return trip to the United States (A. 913-921).

On January 25, 1978, the LADY ELLEN was spotted by the United States Coast Guard Cutter ALERT in the Mona Passage between the Dominican Republic and Puerto Rico (A. 339-341). Following its policy of stopping all United States vessels passing through the channel that were less than 250 feet in length (A. 469-470), the crew of the ALERT boarded the LADY ELLEN for purposes of making a safety and documentation inspection (A. 343-345). Immediately upon boarding, they were informed by Breslin that he was sailing from Colombia and was loaded with marijuana (A. 345, 928). A search of the vessel uncovered approximately 25 tons of marijuana. The crew then cooperated in a controlled delivery of the marijuana to their co-conspirators in North Carolina (A. 925-944). Ultimately, the marijuana was seized, and a number of individuals, including petitioner, were arrested.

ARGUMENT

1. Relying on *Delaware* v. *Prouse*, 440 U.S. 648 (1979), petitioner contends (Pet. 7-9) that the suspicionless stopping and boarding of the LADY ELLEN by Coast Guard officers for the purpose of conducting a safety and documentation check violated his Fourth Amendment rights. This court recently declined to review a similar claim in *Erwin* v. *United States*, cert. denied, No. 79-579 (Feb. 19, 1980), and there is no greater reason to grant review here. Indeed, even assuming that the issue may warrant review in an appropriate case, this is not such a case because, as both courts below correctly concluded (Pet. App. 3a-5a, 9a-10a, 16a), the stop and search of the vessel did not infringe any Fourth Amendment rights of petitioner.

It is uncontested that petitioner was not aboard the LADY ELLEN when it was stopped by the Coast Guard. Nor does the evidence indicate that he had a possessory or proprietary interest in the vessel or its illegal cargo. On the contrary, the evidence showed that while petitioner located the vessel and made the initial offer to purchase it, he was not present when the boat was purchased by an individual named "Walter Poole" (A. 1329-1332, 1335, 1339). To be sure, Breslin testified that he was hired by petitioner and that petitioner advanced funds for provisioning and equipping the vessel. However, petitioner represented to Breslin that "Sam" was his "boss" in the operation (A. 894-895), that he (petitioner) was only an employee of the organization, and that as an employee he would have no financial interest in the cargo of marijuana (A. 661). Accordingly, from the time that "Sam" Govus was introduced to Breslin by petitioner, Govus became the controlling figure in the undertaking. It was Govus who directed Breslin where to take the vessel; instructed him what to do when he

reached Colombia; arranged for the delivery of the marijuana; paid for the marijuana; marked out the exact course the vessel was to take on its voyage to North Carolina; and provided directions to be followed in the event any problems arose. Thus, as both courts below correctly concluded (Pet. App. 4a-5a, 10a), petitioner was no more than Govus' agent in his dealings with Breslin.[3]

Since the evidence established that petitioner was not present and had no right of ownership nor actual control of either the vessel or the marijuana at the time of the stop, the actions of the Coast Guard officers in stopping and boarding the vessel could not have interfered with petitioner's legitimate expectations of privacy. See *Rakas* v. *Illinois*, 439 U.S. 128 (1978).[4] Accordingly, petitioner is not entitled to seek suppression of the marijuana discovered in the course of the boarding.[5]

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[3] Petitioner bases his claim of "standing" on his "responsibility * * * to oversee the boat and crew" before the vessel sailed (Pet. 10). Such a passing contact with the vessel hardly gives rise to a privacy interest which would allow petitioner to challenge a search of the boat several weeks later.

[4] For the same reasons, there is no need to defer disposition of this case pending this Court's decisions in *United States* v. *Salvucci*, No. 79-244, and *Rawlings* v. *Kentucky*, No. 79-5146, argued March 26, 1980.

[5] Even assuming that petitioner has standing to object to the stop, this case does not involve the sort of unconstrained exercise of discretion that was present in *Delaware* v. *Prouse*, *supra*, where police officers made random stops of motor vehicles for registration checks. In *Prouse*, the Court specifically noted that "[q]uestioning of all oncoming traffic at roadblock-type stops" is one method of avoiding the vice of unconstrained discretion. 440 U.S. at 663; *id.* at 663-664 (Blackmun, J., concurring). The stop of the LADY ELLEN was performed as part of a policy of stopping all American flag vessels under 250 feet in length that sailed through the Mona Passage. The stop here thus satisfied the standards established in *Prouse*. See also *United States* v. *Piner*, 608 F.2d 358, 361 (9th Cir. 1979). In a companion case involving several of petitioners' co-defendants who were found to have standing to contest the stop at issue here, the court of appeals upheld the stop in part on the ground that the decision to stop was not left to the discretion of the Coast Guard officers but was based on a uniform policy embodying a neutral standard. *United States* v. *Harper*, No. 79-5016 (4th Cir. Feb. 13, 1980).

2. Petitioner contends (Pet. 5-6, 11-13) that the jury selection plan of the United States District Court for the Eastern District of North Carolina deprived him of a jury drawn from a fair cross section of the community, in violation of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 et seq., and the Sixth Amendment. This claim is without merit.

The Jury Selection and Service Act requires that federal juries be "selected at random from a fair cross section of the community" (28 U.S.C. 1861) and provides that no citizen shall be excluded from jury service "on account of race, color, religion, sex, national origin, or economic status." 28 U.S.C. 1862. Lists of actual or registered voters are to be used as the basic source for juror selection, but the Act also provides that the district court may supplement the voter lists with names drawn from other sources "where necessary to foster the policy and protect the rights secured by sections 1861 and 1862." 28 U.S.C.

1863(b)(2). In accordance with the Act, the jury selection plan of the Eastern District of North Carolina provides that the names of prospective jurors are to be selected at random from lists of actual voters. Petitioner asserts, however, that the plan excludes from juries 62% of the district's residents who are eligible for jury duty but who did not vote in 1976, resulting in the underrepresentation of blacks, blue collar workers, persons without a college education, persons with an annual income under $7,000, and persons between the ages of 18 and 34. Hence, petitioner contends that he was denied his statutory and constitutional rights to a jury selected from a fair cross section of the community, and that to avoid these statutory and constitutional violations the district court should have supplemented the voter lists from other sources.

In order to be entitled to reversal for violation of the statutory fair-cross-section requirement, petitioner must show, at the very least, that a "cognizable" group within the community was substantially underrepresented on jury venires in the Raleigh Division of the Eastern District of North Carolina, where his case was tried. See *United States* v. *Brady*, 579 F.2d 1121, 1132-1133 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979). To prevail on his constitutional claim, petitioner must establish, in addition to the foregoing factors, that the substantial underrepresentation of a cognizable group was due to the "systematic exclusion" of members of that group in the

jury selection process. See *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979).[6]

Petitioner, we submit, has failed in this task. For purposes of fair-cross-section analysis, a "cognizable" group is one which, "in some objectively discernible and significant way, is distinct from the rest of society and whose interests cannot be adequately represented by other members of the * * * jury panel." *United States* v. *Potter*, 552 F.2d 901, 904 (9th Cir. 1977). The courts have held that the young and less educated are not cognizable groups for purposes of the Act. *Id.* at 905 (collecting cases); *United States* v. *Greene*, 489 F.2d 1145, 1149 (D.C. Cir. 1973), cert. denied, 419 U.S. 977 (1974). Similarly, "blue-collar workers" do not constitute a cognizable group, since they have diverse characteristics that defy classification.

While "economic status" is a cognizable factor under the statute (see 28 U.S.C. 1862), individual income alone does not define that status. A bachelor with an income of $6,999, for example, plainly enjoys a higher economic status than the head of a household of four who earns $10,000. Petitioner's statistics are deficient because they fail to take size of household into consideration.

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[6] Some courts have held that proof of "systematic exclusion" of an identifiable group is a prerequisite to establishing a statutory, as well as a constitutional, claim. See, *e.g.*, *United States* v. *Foxworth*, 599 F.2d 1, 3 (1st Cir. 1979). Because petitioner has failed to demonstrate either a substantial disparity in representation or systematic exclusion of any distinctive group, we find it unnecessary to address this question.

Blacks are also a cognizable group within the community. Petitioner's statistics indicate that in the Raleigh Division blacks constitute 26.3% of the population and 16.9% of those who serve (A. 1506). This represents an absolute disparity of 9.4% (a figure perhaps subject to reduction by elimination of children from the statistics). This Court has held, however, that underrepresentation by as much as 10% does not show purposeful discrimination necessary to support an equal protection claim. *Swain* v. *Alabama*, 380 U.S. 202, 208-209 (1965). Although the Court in *Duren* v. *Missouri*, *supra*, 439 U.S. at 368 n.26, noted that equal protection challenges to jury selection (as in *Swain*) are not entirely analogous to fair-cross-section claims—since in equal protection cases both disparate representation and discriminatory purpose must be shown, whereas in fair-cross-section cases a significant disproportion is sufficient in itself to show that prospective jurors do not reflect a fair cross section of the community—the Court did not suggest that the *amount* of disparity necessary to establish substantial underrepresentation was different in the two contexts. See *United States* v. *Maskeny*, 609 F.2d 183, 190 (5th Cir. 1980). Thus, petitioner's statistics fail to demonstrate that blacks, or any other distinctive group, are significantly underrepresented on jury venires in the Raleigh Division.[7]

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[7] Contrary to petitioner's contention (Pet. 11), the fact that 62% of eligible jurors are excluded under the Eastern District's plan because they have chosen not to vote does not by itself establish that any cognizable group is substantially underrepresented.

Moreover, petitioner's constitutional claim must be rejected for the additional reason that he has failed to show the "systematic exclusion" of any cognizable group from jury service. *Duren* v. *Missouri*, *supra*, 439 U.S. at 364. He alleges neither that any group is excluded by the random selection process, nor that it is prevented or discouraged from voting in the district. In every case in which this Court has invalidated a jury selection system that resulted in the exclusion of an identifiable group, the plan involved some device by which members of the group could choose to exclude themselves or could be deliberately excluded by those charged with the responsibility for jury selection. See, *e.g.*, *Duren* v. *Missouri*, *supra*; *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972). By contrast, the jury selection method employed in the Eastern District of North Carolina is objective and random, and does not permit the systematic exclusion of any group.

There is thus no merit to petitioner's contention that the voter lists used to identify potential jurors under the plan should have been supplemented from other sources. As the Tenth Circuit stated in *United States* v. *Evans*, 542 F.2d 805, 812 (1976), cert. denied, 429 U.S. 1101 (1977), "the circuits are in complete agreement that not only is the use of actual voter lists proper, but that neither the Act nor the Constitution require[s] that a supplemental source of names be added to voter lists simply because an identifiable group votes in a proportion lower than

the rest of the population." [8] In the absence of a conflict among the courts of appeals, this issue does not warrant review.

3. On the evening before trial, government witness William Thompson, the prior owner of the LADY ELLEN, was told by the prosecution to be present in the courtroom the following morning. He arrived approximately five minutes before court convened. Almost immediately, he recognized petitioner, known to him as "Jack Long," seated approximately three rows ahead of him. Thompson remained in the courtroom while the jury was selected during the morning session. That evening, Thompson was contacted by the prosecution and asked if he recognized anyone in the courtroom; he replied that he recognized "Jack Long" (A. 1275-1277). Petitioner contends (Pet. 13) that Thompson's subsequent in-court identification

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[8] In enacting the Jury Selection and Service Act, Congress recognized that disparities might result because a disproportionate number of members of a distinct group might choose not to register or vote. Nevertheless, Congress did not insist on supplementation to remedy such disparities.

> In a sense the use of voter lists as the basic source of juror names discriminates against those who have the requisite qualifications for jury service but who do not register or vote. This is not unfair, however, because anyone with minimal qualifications—qualifications that are relevant to jury service—can cause his name to be placed on the lists simply by registering or voting. No economic or social characteristics prevent one who wants to be considered for jury service from having his name placed in the pool from which jurors are selected.

H.R. Rep. No. 1076, 90th Cong., 2d Sess. 5 (1968). See *United States* v. *Brady, supra*, 579 F.2d at 1134.

of him should have been excluded because the pretrial confrontation was impermissibly suggestive. This claim is insubstantial.

The pretrial confrontation was not suggestive. When Thompson entered the courtroom there were ten to twelve persons on one side, who he later learned were prospective jurors, and approximately five or six persons on the other side (A. 1293-1294). From this substantial group, he immediately recognized petitioner as the man with whom he had discussed the sale of the LADY ELLEN. There is no reason to question the validity of his wholly spontaneous identification. In these circumstances, we submit that the pretrial confrontation was not impermissibly suggestive. See *Boyd* v. *Henderson*, 555 F.2d 56, 59-60 (2d Cir.), cert. denied, 434 U.S. 927 (1977).

In any event, even if the pretrial confrontation was suggestive, it did not taint Thompson's subsequent in-court identification, since that was based on a reliable independent source. See *United States* v. *Crews*, No. 78-777 (Mar. 25, 1980), slip op. 9-10 & n.18; *Manson* v. *Brathwaite*, 432 U.S. 98, 114-116 (1977); *Neil* v. *Biggers*, 409 U.S. 188, 199-201 (1972). Thompson testified (A. 1268-1272) that he had observed petitioner when petitioner was in Bayou LaBatre in December 1977 and then again in January 1978. On the first occasion, petitioner was constantly in Thompson's shop for one or two days. Thompson also observed petitioner at close range during a four to five hour trip aboard the LADY ELLEN, when the only other person present was Thompson's brother-in-law.

On the second occasion, Thompson observed petitioner around his shop for at least seven days, during which he sometimes talked to petitioner face-to-face. Moreover, when asked by the court whether his identification would be based on his recollection of events in 1977 and early 1978 or on the pretrial confrontation, Thompson replied, "It is based on the man I knew in Bayou LaBatre as Jack Long" (A. 1298). Accordingly, any suggestiveness in the pretrial confrontation plainly did not give rise to an unreliable in-court identification.[9]

4. At trial, Breslin testified (A. 899) that prior to the voyage he and his crew stayed at a Mobile, Alabama, motel at petitioner's expense. To corroborate this testimony, the government introduced into evidence the motel registration card completed by Breslin, upon which was entered the license number of the rental car driven by petitioner (A. 900-902). Petitioner contends (Pet. 7, 13-14) that the information on the registration card was unreliable and should have been excluded because his license number had been substituted on the card for another license number that had been crossed out. But the change in license numbers was clearly explained by the evidence. A motel clerk testified (A. 1200) that "[o]ur motel is so constructed that when they pass

[9] Since the in-court identification was derived from an independent source, any violation of petitioner's Sixth Amendment right to counsel during the pretrial confrontation did not warrant exclusion of the identification testimony at trial. See *United States* v. *Wade*, 388 U.S. 218, 240-241 (1967).

by, we can double-check the license numbers on the car. If not, we go out and check them. When we double-check the numbers and it is not the correct number, we put the correct number down. That is for security reasons." This testimony was consistent with Breslin's statement (A. 899-900) that after giving a correct description of the rental car on the registration card, he altered the license number at petitioner's suggestion. Accordingly, the alteration of the numbers was sufficiently accounted for and the card was properly admitted into evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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